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JAMES H. McKENNEY,
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No. 292. Oct. Term, 1898.

Brf. of Harris for P. C. Con

Filed Dec. 19, 1898.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 292.

HOSEA B. TULLIS

v.

THE LAKE ERIE AND WESTERN RAILROAD COMPANY.

Brief in Response to the Petition for Certiorari.

ADDISON C. HARRIS,
Att'y for Plaintiff in Error.

C. E. Hollenbeck, Printer, Indianapolis.

IN THE

Supreme Court of the United States.

No. 292.

HOSEA B. TULLIS

v.

THE LAKE ERIE AND WESTERN RAILROAD COMPANY.

The appellant makes the following response to the motion to have the whole case certified into this court.

The petition shows:

1. A writ of error was allowed by the trial court July 10, 1897. Pet., p. 48.

2. That in the circuit court of appeals on January 21, 1898, and again on February 24, appellee filed motions to (1) dismiss the writ of error, and (2) strike from the record the bill of exceptions. *Vide*, pp. 7 and 8 of proceedings in the circuit court of appeals, printed at the end of the petition.

3. The case was heard on February 25, 1898. *Id.*, p. 9.

4. March 7, 1898, appellee filed cross errors. *Id.*, p. 13.

5. April 7, 1898, certificate issued herein. *Id.*, p. 14.

If the certificate is answered that the statute of Indiana is void, the case ends. If valid, then appellee seeks to have this court decide its motions to dismiss the writ of error and strike the bill of exceptions from the record.

Is this a question of "peculiar gravity and general importance?"

In *Forsyth* v. *Hammond*, 166 U. S., p. 514, it is said:

"We have declined to issue writs of *certiorari* in cases where, there being only a matter of private interest, there had been no final judgment in the court of appeals."

What is the question here? We submit it turns upon the practice under and the construction and application of rule 34, of the circuit court for the district of Indiana, which reads as follows:

"Rule 34. *Ordered*, That all motions, demurrers and exceptions hereafter filed must be supported by written or printed briefs, to be filed in duplicate with such motion, demurrer or exception. Failure to file such briefs shall be deemed a waiver of such motion, demurrer or exception. If oral argument is desired by the party, he shall request it at the time of filing his briefs. The adverse party shall have fifteen days after the briefs of the moving party are filed, in which to file answering briefs in duplicate.

"If such party desires an oral argument, it must be requested at the time of filing his briefs. When any motion, demurrer or exception is filed, accompanied by briefs, the clerk shall forthwith notify the adverse party thereof."

The motion for a new trial was filed at the same term the trial was had and judgment entered on the verdict.

Judge Baker certifies in the bill of exceptions:

"There is no rule of this court regulating the time within which motions for new trial shall be filed, or making any provision for, or in regard to such motion; nor is there any rule or custom or practice in regard to the time of the verdict for rendition of judgment thereon."

Trans., p. 45.

He also certifies the official stenographer reported the trial in full; and the court made no limitation as to time when the exceptions should be written out and presented for signature. *Id.*, p. 46.

He also certifies that the court was in session when the motion and briefs, in compliance with the rule, were filed in the clerk's office; that one copy of the brief was placed on file with the motion, and the other was properly served (on the defendant) for a new trial.

On the filing, the following record was made:

"Comes now the plaintiff by Langdon & Coffroth and A. C. Harris, his attorneys, and files his motion for a new trial herein, in the words and figures following, to wit:"

Trans., p. 16.

At the close of the trial term the court made this entry:

"November Term, 1896.

"Monday, May 3, 1897, before Hon. John H. Baker, judge.

"General continuance:

"Ordered by the court that all plaints and proceedings depending in said court, and not specially continued, be and the same are hereby continued until the next term of this court. And the court doth now adjourn until the first day of the next term thereof."

This was brought into the record by *certiorari*, and appears on pp. 9–12 of the proceedings in the circuit court of appeals herein.

On May 26 the defendant's attorneys, in compliance with rule 34, filed "an answering brief on the motion

for a new trial, in the clerk's office—and a copy was served on the plaintiff's attorneys." Trans., p. 46.

On June 1 following the motion was denied, exceptions allowed, and sixty (60) days given, and the bill signed and filed within the time.

The bill of exceptions was then tendered to the defendant's attorneys, who made certain amendments, and when the same was presented for signing they objected:

1. "That on the facts of the case" it was too late to sign a bill.

2. That it was also too late to sue out a writ of error.

It seems to be settled that the time limited for the writ of error does not begin to run until the motion for a new trial is denied.

Aspen Mining, etc., Co. v. *Billings*, 150 U. S. 31, 36;
Voorhees v. *Noye Mfg. Co.*, 151 U. S. 135;
Texas, etc., Ry. Co. v. *Murphy*, 111 U. S. 488;
Memphis v. *Brown*, 94 U. S. 715, 717;
Brocket v. *Brocket*, 2 How. 238.

Judge Taft so held in *Altenberg* v. *Grant*, 83 F. R. 980.

Since the adoption of rule 34 it will not be gainsaid that no motions or demurrers in law cases, or exceptions in equity cases, or briefs, are filed in open court, or in chambers, but in the clerk's office, who stamps the file marks, makes the entries and record of such filing, mails a copy of the pleading and brief to opposing counsel; who file in like manner an answering brief in duplicate, and the matter being thus prepared for decision the clerk takes the pleading and briefs to the judge.

This construction and practice is shown by the facts that on April 26, 1897, "the plaintiff *filed in the clerk's office*, the court being then in session, (the motion) and reasons for a new trial and written briefs, *in compliance with the rule*"; that "on May 26, 1897, the defendant's attorneys filed an answering brief on the motion for a new trial *in the clerk's office* * * *." Trans., p. 46.

And "neither party in their briefs (having) asked for an oral argument, *therefore* * * * the clerk brought to the judge in chambers the motion for a new trial with the briefs of attorneys * * *." *Id.*, p. 46.

At common law and under the state practice a motion for a new trial may be filed during the trial term. 1 R. S. Ind. 1894, section 638.

Will it be argued that the court might not have sustained the motion and set aside the judgment at the ensuing term?

The question then comes whether *in this case*, under these precise facts, the judge had power to allow a bill of exceptions when acting on a motion for a new trial.

This precise question has been decided several times in the affirmative.

In *Woods* v. *Linvall*, 48 F. R. 73, the case was tried at the January term, 1891, and judgment entered. During that term, a petition for new trial was filed. At the succeeding June term, the petition was argued and overruled and a bill of exceptions then signed, sealed and filed. The defendant objected to the allowance of the bill, because no order was entered at the January term expressly extending the time for filing the bill to the June term, nor any consent given that it might be filed. And on appeal appellee moved to strike out the bill of exceptions.

It will thus be seen the cases are parallel.
The court say:

"We are all agreed that the motion to strike out the bill of exceptions should be overruled. It is true that in several cases cited by counsel for defendant in error, to wit, *Walton* v. *U. S.*, 9 Wheat. 651, *Ex Parte Bradstreet*, 4 Peters 102, and *Muller* v. *Ehlers*, 91 U. S. 249, it was held in effect that, in the absence of an order of court extending the time, a bill of exceptions covering errors committed at the trial can not be allowed and filed (unless by consent of parties) after the term has expired at which the judgment was rendered. *But in none of these cases did the question arise whether a bill of exceptions may not be allowed and filed at the term when the motion for a new trial is finally acted on, even though such action is taken at a term subsequent to the entry of judgment; and that is the precise question which confronts us in the case at bar.* The authorities cited are either cases in which no motion for a new trial was filed, or in which the bill of exceptions was presented after the lapse of the term at which the motion for a new trial was overruled. According to well established principles, therefore, the judgments involved had become final at the term preceding that at which a bill of exceptions was tendered. Since the decision in *Rutherford* v. *Ins. Co.*, 1 F. R. 456, we believe the practice has been uniform in all the districts of this circuit, where the custom prevails of entering judgments immediately on rendition of verdict, to allow a bill of exceptions during the term at which the motion for a new trial is overruled, even though it happens to be a term subsequent to the entry of the judgment. This practice, according to our observation, has become so common that it may be termed a rule of procedure in this circuit. It is a convenient practice. It obviates the necessity of settling a bill of exceptions at the trial term, which is useless labor if the motion for a new trial is continued to and is sustained at the succeeding term. And in these days, when it is customary to take notes of trial proceedings in short-hand, the practice in question is not open to those objections formerly urged against it. We are of the opinion, therefore, that the practice which has hitherto obtained in many districts of the circuit should be upheld unless it is overborne by controlling authority, and we find no such authority. On the contrary, we think the rule requiring bills of exceptions to be filed at the term when judgment is rendered must be understood to mean the term when the judgment becomes final and by reason of its becoming final the court loses control of the record."

In other cases this rule has been restated.

Railway Co. v. *Russell*, 60 F. R. 501;
United States v. *Carr*, 61 F. R. 803.

In a very late case, decided by the supreme court of Michigan, the rule was stated to be:

"The writ of error is the *dernier ressort*, and judgment can not be said to be final so as to deprive the trial court of the power to act in the premises during the term in which the court disposes of a pending motion. In case, therefore, no motion for a new trial is made, the term within which a bill of exceptions must be settled, or the time extended in the first instance, is that within which the judgment is entered; but where a motion for a new trial is made within the time allowed by rule, or within the time allowed by the court, or by leave of the court, the term within which such bill of exceptions must be settled, or the time extended, must be deemed to be that in which such motion is finally determined."

Adrain Furniture Co. v. *Lenawee Circuit Judge*, 52 N. W. 615;
Greeley v. *Percival*, 21 Fla. 538;
Hearson v. *Graudine*, 87 Ill. 116;
People v. *Gary*, 105 Ill. 264;
Riddlesbarger v. *McDaniel*, 38 Mo. 139;
Givens v. *Van Studiford*, 86 Mo. 149;
Shreve v. *Cheeseman*, 69 F. R. 785;
Talbott v. *Press Co.*, 80 F. R. 567.

In *People* v. *Gary*, *supra*, a case was tried in the superior court of Cook county, in the absence of the defendant, and judgment rendered against him. During that term defendant filed a motion for a new trial, which remained undisposed of at the close of the term. At the next term the motion was overruled, appeal allowed and 20 days given to file a bill of exceptions. Within the time a bill was presented containing the evidence given on the trial of the cause.

Judge Gary refused to sign any bill containing the evidence given on the trial. Mandamus was brought to compel him to sign such bill, and was granted by the supreme court, saying:

"In the Evans case cited above it is said—A bill of exceptions "should be reduced to form, and signed, during the term in which "the cause is tried, except in cases where counsel consent or the "judge, by an entry on the record directs that it may be prepared in "vacation and signed *nunc pro tunc*."

"Of course what is meant by the expression—the term in which "the cause is tried—is the term at which final judgment is rendered "in the cause. It would be useless labor for a party to prepare a bill "of exceptions before the motion for a new trial had been passed "upon, as it could not be known whether the bill would be needed "until the final action of the court on the motion." (Page 270.)

In *United States* v. *Breitling*, 20 How. 252, Chief Justice Taney, forty years ago, refused to strike out a bill of exceptions signed by the circuit judge after the close of the term, saying:

"And it is always in the power of the court to suspend its own rules or to except a particular case from its operation whenever the purposes of justice require it."

Judge Woods, as practitioner and as judge on the state bench, and on the federal bench in the district of Indiana, is of course entirely familiar with the practice, in that court.

At most we submit that this point is not of peculiar gravity or general importance. It is otherwise, as to the question certified, viz: the constitutionality of the statute embraced in the certificate.

Respectfully submitted,

ADDISON C. HARRIS,
Att'y for Plaintiff in Error.

Indianapolis, Dec. 10, 1898.